STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

YUBA CITY UNIFIED EDUCATION ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. S-CE-1519
v.	)	PERB Decision No. 1095
YUBA CITY UNIFIED SCHOOL DISTRICT,	)	April 27, 1995
Respondent.	)	

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Yuba City Unified Education Association, CTA/NEA; Pinnell & Kingsley by Wendi L. Ross, Attorney, for Yuba City Unified School District.

Before Blair, Chair; Garcia and Caffrey, Members.

DECISION

CAFFREY, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Yuba City Unified Education Association, CTA/NEA (Association) to a proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the Yuba City Unified School District (District) did not violate section 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA),[1] as alleged by the Association,

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce

when it changed the tenor of an "activity" period to that of a quasi-academic course and made related modifications to the 1992-93 schedule resulting in a change in the structure of some teacher preparation periods.

The Board has reviewed the entire record in this case, including the proposed decision, the hearing transcript, the arbitrator's opinion and award, and the submissions of the parties. In accordance with the following discussion, the Board sets aside the proposed decision of the ALJ, defers to the arbitrator's award, and dismisses the unfair practice charge and complaint.

BACKGROUND

Procedural and Factual Background

In the late 1970's, the Gray Avenue Intermediate School (Gray Avenue) had a daily lunchtime activity period in which the teachers supervised a number of sports and activities which were not purely academic. In the mid-1980's, the principal, concerned with the way both teachers, and students were handling the period, decided to modify the activity program by including a one-day-a-

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> employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

week homeroom. The homeroom time was to give students an opportunity to learn how to take tests and improve their social skills, among other things.

For 1990-91, the activity period was restructured once again, based in part on concerns for student behavioral problems and a lack of interaction between teachers and students. Relying on a State Department of Education publication created for middle school students, the principal attempted to address these concerns by substituting a new homeroom/study hall period for the activity period.

The Association did not demand to bargain this change, but several teachers believe they received a commitment from the principal that this new concept would not turn into a teaching period. The principal denies making such a commitment.

Following the changes made by the principal to the activity period, problems still existed, some of which were the result of the schedule. While half the students attended the study hall/study skills period, the other half attended lunch and then the two groups switched after 35 minutes. During the switch, many students cut class and remained out in the lunch area. Although a majority of the teachers were teaching study skills during these periods, others had limited involvement with the students.

During the 1991-92 school year, the Gray Avenue principal held several staff meetings with teachers at which he proposed changes to the study hall/study skills period in 1992-93. At

some of these meetings, teachers indicated that any such changes would be negotiable. While this issue was not definitively-addressed, the decision was made that for the 1992-93 school year, the study hall/study skills period would be modified to a study skills/advisory period, and related modifications would be made to the school schedule.

As a result of the change, teachers were required to teach a specified curriculum of study skills, i.e., note taking, test taking hints, etc. The schedule modifications added 30 minutes to each teacher's workday for the increased academic responsibilities of the study hall/advisory class. Furthermore, there was an increase of teaching time in each of the class periods.

This modification in the work schedule led to a decrease in break time, a decrease in the amount of passing time, a modification of preparation periods and a significant increase in the overall amount of instructional time. Much of this increase was directly attributable to the implementation of the study skills/advisory period.

The District and the Association are parties to a collective bargaining agreement (CBA) with a term of July 1, 1990 through June 30, 1993. Article IV, Section E, states:

> The middle school teaching day will be the equivalent of a minimum of 300 minutes of classroom instruction, and the remaining time in the school day shall be utilized for planning, evaluating, preparing, and obtaining materials. In the event of extenuating circumstances, the administrator

> shall assign personnel as conditions necessitate.

The parties are also signatories to a "Letter of Understanding" dated August 26, 1983, which expresses the parties' intent concerning "the Gray Avenue School teaching day." The Letter of Understanding states, in pertinent part:

> The five-period day referred to in the Agreement and embodied in Article III, Section E, Hours, refers to periods of 50 minutes or less in time, plus the 30-minute instructional activity period. Further, the intent of the Agreement is for the Administration to design a schedule that would accommodate periods not to exceed 50 minutes in length.

There is also a Letter of Understanding signed in March and April 1985, relative to a grievance filed by an individual Gray Avenue teacher. Within the letter, the parties agreed that they would:

> . . . meet to discuss the discrepancy in the teaching day at Gray Avenue School with the current contract of 300 minutes per day. During their discussions, they will resolve the issue of the minimum of 300 minutes of instructional time by computing the current length of the school day and how it must be adjusted to meet that requirement for the next school year.

The CBA also includes a grievance procedure which culminates in binding arbitration (Article VIII).

On July 31, 1992, the Association filed a grievance over "the principal's assignment of an advisory period to the unit members at Gray Avenue School." The grievance alleged that the following CBA provisions had been violated, misapplied or

misinterpreted: Article IV - Hours, Section E; Article VI - Procedures for the Evaluation of Certificated Employees, Section A and D; Article XV - Class Size, Section A and C; Article IX - Salaries; Article X -Extra Pay for Extra Duty; Article XIX - Complaints Concerning School Personnel/Public Charges; Article XXI - Non-Discrimination; and Appendix A - Teacher Duties and Responsibilities.

On November 24, 1992, the Association filed the instant unfair practice charge, alleging that the change in the study hall/study skills period implemented for the 1992-93 school year constituted a unilateral change in violation of EERA section 3543.5. The charge also alleges that the daily schedule of teachers at Gray Avenue was unilaterally changed, also in violation of EERA. The charge specifically references the 1983 and 1985 letters of understanding.

On December 22, 1992, the District requested PERB to defer the unfair practice charge to the parties' contractual grievance and arbitration process in accordance with EERA section 3541.5.[2]

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[2]EERA section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

On December 24, 1992, by agreement of the parties, the charge was placed in abeyance pending the completion of the arbitration process resulting from the Association's July 31, 1992, grievance.

On April 17, 1993, the Association requested that the charge be taken out of abeyance. On May 10, 1993, the office of PERB's general counsel issued a complaint charging that the District violated EERA section 3543.5(a), (b) and (c) when it changed the study hall to require a designed teaching curriculum, and made associated changes to the schedule. Also, on May 10, 1993, a Board agent issued a letter refusing to defer the matter to the parties' contractual grievance and arbitration process. The letter noted that the Board in Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) held that EERA section 3541.5(a) establishes a jurisdictional rule requiring that a charge be dismissed and deferred if: (1) the grievance machinery of the parties' CBA covers the matter at issue and culminates in binding arbitration; and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the parties' CBA. The Board agent concluded that under Lake Elsinore the conduct complained of by the Association is not arguably prohibited by the parties' CBA and refused to dismiss and defer the charge.

On May 28, 1993, the District filed with PERB its answer to the complaint, denying the Association's allegations and filing several affirmative defenses. The District also moved that "the

issue of the activity period at Gray Avenue Intermediate School be deferred" to the arbitration process. The District asserted that an arbitration hearing on the issue was scheduled for June 7, 1993.

On June 3, 1993, an informal conference was held with a PERB ALJ in an attempt to reach voluntary settlement, but the parties were unable to resolve their differences.

The Arbitrator's Award

On June 7, 1993, an arbitration hearing was conducted. In his October 12, 1993, opinion and award, the arbitrator traces the development of the activity period from its initiation in 1979, through the modifications which occurred in 1992-1993 and formed the basis of the Association's grievance. The arbitrator also traces the development of the CBA language affecting hours found in Article IV, Section E.

The arbitrator concludes that the introduction of the study skills/advisory class, and the related changes in teacher schedules, are permitted by Article IV, Section E of the CBA which calls for a teaching day "of a minimum of 300 minutes of classroom instruction." The arbitrator concludes that "Even with the 1992-93 scheduling changes, teaching time at Gray remained below the contract minimum." The arbitrator finds that the 1983 "Letter of Understanding" predates the adoption of the "300 minutes" language in CBA Article IV, Section E, and was designed to clarify a clause which appeared in prior agreements between the parties. With respect to the 1985 letter, the arbitrator

distinguishes it as an individual grievance settlement, and notes that it contains language indicating that the parties would discuss the 300-minute minimum instructional day. The arbitrator concludes that the District's actions were not inconsistent with this language.

The arbitrator also concludes that the District had not violated the other CBA sections cited by the Association in its grievance. The arbitrator finds that the schedule changes at Gray Avenue did not result in unequal preparation time for certain teachers, since teachers were able to "borrow" available time to augment the provided preparation period.

The arbitrator notes that the Association had alleged an unlawful unilateral change and "filed an unfair practice charge against the District with respect to these same issues." With regard to the teacher schedule changes, the arbitrator concludes that "the exercise of management's authority to make the changes at issue did not violate the contract as it exists." In a footnote the arbitrator notes that he:

> . . . declines to determine any unfair labor practice issues in this context, as the parties have not agreed to submit them for determination. This Award is limited solely to the contract question presented.

The arbitrator reaches the following conclusion in his opinion and award:

> The grievance is denied. The District did not violate the Agreement when it implemented a study skills/advisory class during the 1992-93 school year, and made associated scheduling changes.

The ALJ's Proposed Decision

A hearing pursuant to the unfair practice charge was held before a PERB ALJ on December 2 and 3, 1993, and February 15, 1994. During the hearing, the District renewed its motion to defer the matter to the parties' grievance and arbitration process. The District asserted that the application of the post-arbitration deferral standard cited by the Board in San Diego County Office of Education (1991) PERB Decision No. 880 should result in deferral to the arbitrator's opinion and award. The ALJ, noting that the arbitrator had specifically declined to determine any unfair labor practices in his decision, denied the District's motion. The ALJ took administrative notice of the arbitrator's opinion and award.

The ALJ issued his proposed decision on June 30, 1994. In it, the ALJ traces the historical progression of the study hall period from its beginnings in the late 1970's to the 1992-93 modifications which prompted the filing of the unfair practice charge. The ALJ also traces the progression of the provision affecting hours found in Article IV, Section E of the parties' CBA, as well as changes in the daily schedule relating to variations in the teacher instructional day.

The ALJ finds that the change in the tenor of the activity period, although it increased the teachers' instructional minutes, did not increase their workday beyond the level agreed to in Article IV, Section E of the CBA. The ALJ also finds that the related changes in the teacher schedule at Gray Avenue did

not effectively shorten some teachers* preparation periods because they were able to add other available time to achieve the same level of preparation time. The ALJ concludes:

> . . . there is insufficient evidence upon which to find that the District violated the Act, when it (1) changed the tenor of the "activity" period to that of a quasi-academic course, or (2) modified the 1992-93 schedule resulting in a change in the structure of some teacher preparation periods at Gray School.

POSITIONS OF THE PARTIES

The Association filed exceptions to the ALJ's decision asserting that the ALJ incorrectly interpreted the meaning of Article IV, Section E of the parties' CBA. The Association also alleges that the ALJ incorrectly determined that the schedule changes at Gray Avenue had not unilaterally altered the preparation periods of certain teachers.

The District responds to the Association's exceptions, and also excepts to the ALJ's decision that the matter was not subject to deferral to the parties' contractual grievance and arbitration process. The District also requests that the Board award attorneys' fees to the District in this case, arguing that the Association's pursuit of this matter after unfavorable decisions by the arbitrator and the ALJ is "without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of process." (Los Angeles Unified School District (1993) PERB Decision No. 1013 (Los Angeles).)

The Association responds that this case does not meet the deferral standard established by the Board in Lake Elsinore. The

Association notes that the arbitrator had specifically declined to decide any unfair practice charge issues which are "better suited to a PERB hearing." The Association also opposes the District's request for attorneys' fees.

DISCUSSION

In cases in which an arbitration award covers a matter at issue in a complaint before PERB, a post-arbitration repugnancy analysis is conducted to determine whether the complaint should be dismissed and deferred to the arbitration award. Therefore, the Association's argument that this matter is not subject to deferral under the Board's pre-arbitration deferral standard, enunciated in Lake Elsinore, is misplaced.

EERA section 3541.5 states, in pertinent part:

> (a) Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following:
>
> (2) Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. However, when the charging party demonstrates that resort to contract grievance procedure would be futile, exhaustion shall not be necessary. The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on

> the merits. Otherwise, it shall dismiss the charge.
> (Emphasis added.)

Unlike the mandatory jurisdictional requirement governing pre-arbitration deferral matters, in a post-arbitration context the Board's jurisdiction is discretionary and limited solely to a determination of whether the arbitration award is repugnant to the purposes of EERA.

In Dry Creek Joint Elementary School District (1980) PERB Order No. Ad-81a (Dry Creek), the Board adopted the post arbitration deferral standard enunciated by the National Labor Relations Board (NLRB) in Spielberg Manufacturing Company (1955) 112 NLRB 1080 [36 LRRM 1152] (Spielberg) and Collyer Insulated Wire (1971) 192 NLRB 837 [77 LRRM 1931]. Under this standard, the Board will exercise its discretionary jurisdiction to dismiss and defer a complaint to the arbitrator's award if: (1) the matters raised in the unfair practice charge were presented to and considered by the arbitrator; (2) the arbitral proceedings were fair and regular; (3) all parties to the arbitration proceedings agreed to be bound by the arbitral award; and (4) the award is not repugnant to the purposes of the EERA.

In Olin Corporation (1984) 268 NLRB 573 [115 LRRM 1056] (Olin Corporation), the NLRB further described its standard for deferral to an arbitrator's award:

> . . . we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2)

> the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. [Fn. omitted.] In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the Spielberg standards of whether an award is "clearly repugnant" to the Act. . . . Unless the award is "palpably wrong," [Fn. omitted.] i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

The NLRB further stated that it:

> . . . would require that the party seeking to have the Board [NLRB] reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the Board [NLRB] ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award. [Fn. omitted.]

Applying the Dry Creek post-arbitration deferral standard to the instant case, the Board concludes that this matter should be dismissed and deferred to the arbitrator's award which resulted from the parties' contractual grievance and arbitration process.

First, it is clear that the matters raised in the unfair practice charge were presented to and considered by the arbitrator. In both contexts, the issue involves whether the District acted properly in changing the nature of the study hall/activity period, and in making related schedule modifications for the 1992-93 school year. Furthermore, the facts considered by the arbitrator in resolving the issue are identical to those relevant to resolving the unfair practice charge.

The Association argues that the arbitrator's statement in a footnote that he "declines to determine any unfair labor practice issues" should lead the Board to decide that deferral is not appropriate in this case. A mere statement by an arbitrator is not dispositive of the Board's exercise of its jurisdiction under EERA. The NLRB dealt with a similar circumstance in Bay Shipbuilding Corp. (1980) 251 NLRB 809 [105 LRRM 1376], in which it considered deferral to an award by an arbitrator who specifically stated that he was not deciding whether the National Labor Relations Act had been violated. Concluding that the arbitrator's factual findings clearly paralleled those presented by the unfair labor practice, the NLRB deferred to the arbitrator's award irrespective of his statements. Similarly in this case, the arbitrator considered facts identical to those presented by the unfair practice charge. Therefore, despite the arbitrator's statement, the first prong of the test described in Dry Creek and amplified in Olin Corporation for deferral to arbitration awards has been met, and the Board concludes that the arbitrator adequately considered the matters raised in the unfair labor practice charge.

Second, the arbitral proceedings appear to have been fair and regular, and there is no assertion to the contrary by either party.

Third, by the terms of the parties' CBA at Article VIII, they have agreed to be bound by the arbitral award.

Fourth, and most importantly, the Board must determine whether the arbitrator's award is repugnant to the purposes of the EERA. Under the standard described in Spielberg and Olin Corporation, unless the award is "palpably wrong" and not susceptible to an interpretation consistent with EERA, the Board will defer to the arbitrator's award. Furthermore, the Board has stated that "The possibility that this Board may have reached a different conclusion in interpreting the parties' agreement and the evidence does not render the award unreasonable or repugnant." (Los Angeles Unified School District (1982) PERB Decision No. 218.) In this case, the Board finds nothing in the arbitrator's award suggesting that it is repugnant to the purposes of EERA. Additionally, the party seeking to have the Board reject deferral, the Association, has not offered any argument that would lead to the conclusion that it is. (Olin Corporation.) Accordingly, the Board concludes that the arbitrator's award is not repugnant to the purposes of EERA, and the Board's standard for dismissing and deferring to that award has been met.

Finally, the complaint issued as a result of the unfair practice charge in this case alleges that the District's conduct violated EERA section 3543.5(a), (b) and (c), involving the rights of both individual employees and the exclusive representative/employee organization. In a post-arbitration case in which multiple violations were alleged based on the employer's conduct, San Diego County office of Education, supra. PERB

Decision No. 880, the Board reviewed the arbitrator's award and determined that the alleged violation of employee organization rights had not been raised before or decided by the arbitrator. Accordingly, while the Board applied a post-arbitration deferral analysis to the alleged violation of individual employee rights, it concluded that a pre-arbitration deferral analysis under Lake Elsinore must be applied to the alleged violation of employee organization rights.

In a post-arbitration context, the Board declines to continue the practice of applying dual jurisdictional standards based on the section of the statute alleged to have been violated, as was done in San Diego. Once an arbitration award has been issued, the Board applies the post-arbitration deferral standard it adopted in Dry Creek. Under that standard, the Board determines if the contractual issue and the unfair practice issue are factually parallel, and whether the arbitrator was presented with the facts which are relevant to resolving the unfair practice. Any differences between the contractual and statutory standards of review are evaluated to determine if the arbitrator's award is clearly repugnant to the purposes of EERA. In a post-arbitration context, the Board's discretionary jurisdiction is limited solely to a repugnancy review of the arbitration award. This precludes the application of the Lake Elsinore mandatory jurisdictional standard which governs pre-arbitration deferral matters.

Accordingly, the Board hereby overrules San Diego and its progeny to the extent that they conclude that the Board may apply dual jurisdictional standards in a post-arbitration context.

Attorney Fees

The Board does not find the Association's appeal of the ALJ's proposed decision to be "without arguable merit, frivolous, vexatious, dilatory, pursued in bad faith or otherwise an abuse of the process." (Los Angeles.) Accordingly, the District's request that PERB award attorneys' fees and costs is hereby denied.

CONCLUSION

The Board finds that the arbitrator's award is not repugnant to the purposes of EERA and, therefore, dismisses and defers the matter to the arbitrator's award.

ORDER

The complaint and unfair practice charge in Case No. S-CE-1519 are hereby DISMISSED.

Chair Blair joined in the Decision.

Member Garcia's concurrence and dissent begins on page 19.

GARCIA, Member, concurring and dissenting: I concur in the result that the Yuba City Unified School District (District) did not commit an unfair labor practice. The District's unilateral exercise of contractual rights was consistent with the terms of the collective bargaining agreement (CBA) between the parties.

Due to a continuing misinterpretation of Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore) and the paraphrase "arguably prohibited," Public Employment Relations Board (PERB or Board) agents fail to properly analyze and defer disputes that are covered by contracts and subject to a grievance agreement. The error was repeated in this case when a complaint issued charging the District with violations of the Educational Employment Relations Act (EERA) section 3543.5(a), (b) and (c); in essence the District was charged with an unlawful unilateral change to a past practice. In the Board agent's view, the CBA between the parties did not "arguably prohibit" the issues raised by the Yuba City Unified Education Association, CTA/NEA (Association).

In analyzing the dispute, the Board agent properly referred to Lake Elsinore for guidance, which held that:

> [EERA section 3541.5] is intended to operate as a jurisdictional limitation . . . where the matter is covered by the parties' grievance procedures and binding arbitration. . . . [Id. p. 25; emphasis added.]

That unanimous opinion also states that:

> . . . the Legislature plainly expressed that the parties' contractual procedures for binding arbitration, if covering the matter

at issue, precludes this Board's exercise of jurisdiction. (Id. p. 31; emphasis added.)

The opinion goes on to state that:

> . . . section 3541.5(a) precludes this Board's exercise of jurisdiction where the disputed issue is covered by the parties' contractual grievance-arbitration procedures....
> (Emphasis added.)

Nowhere in Lake Elsinore does the paraphrase "arguably prohibited" appear; its meaning is found by reading two other cases[1] which conclude that where the subject matter in dispute is susceptible of an interpretation that it is covered by the parties' contract, the dispute should be deferred until the grievance process is exhausted. That policy will defer most disputes and where coverage remains questionable, Riverside states that doubts should be resolved in favor of coverage.

My analysis shows that on July 31, 1992, the Association filed a grievance claiming that the District's unilateral change in policy violated the CBA provisions. The parties did eventually go to arbitration, so they must have presumed the issue was covered by the contract.

During arbitration, the Association stated the issue as follows:

> Did the District violate the Collective Bargaining Agreement and established practice when it unilaterally changed the teaching schedule at the Gray Avenue School for the 1992-93 school year? If so, what should be

[1]Inglewood Unified School District (1990) PERB Decision No. 821 and Riverside Community College District (1992) PERB Order No. Ad-229 (Riverside).

> the appropriate remedy? (Arbitrator's Opinion and Award, p. 2.)

The District stated the issue as follows:

> Did the District violate the following provisions of the parties' Collective Bargaining Agreement: Article IV, Section E; Article VI, Sections A and D; Article XV, Sections A and C; Article IX; Article X; Article XIX; Article XXI, and Appendix A when the study hall/study skills period at Gray Avenue Intermediate School was refocussed as a study skills advisory period for the 1992-93 school year? (Id.)

The arbitrator found that the issue should be framed as follows:

> Did the District violate the Collective Bargaining Agreement during the 1992-93 school year by implementing a study skills/advisory program during a designated period at the Gray Avenue Middle School? If so, what should be the appropriate remedy? (ID., P. 3.)

The Arbitrator's Award concluded that the District had a contractual right to make the change. The PERB administrative law judge (ALJ) considered only whether section 3543.5(c) was violated by the District's unilateral change in policy. During the hearing, both parties argued over the interpretation of the contract before the ALJ and, based on his interpretation of the contract, the ALJ found the District had a contractual right to change its policy.

It is apparent that only the Board agent, through subjective analysis, was of the opinion that the contract did not cover the dispute. The record confirms the District's position that the matter should have been deferred early on. The District was put

to unnecessary expense, not because the Association was vexatious and frivolous, but because PERB improperly applied its jurisdictional statutes.

After the arbitrator's award came into being, PERB's jurisdiction was limited to a repugnancy review of the award based on the contractual issues decided by the arbitrator. The law does not permit review for any other purpose.[2] However, the majority opinion uses a repugnancy review to attempt to adopt a deferral policy, based on collateral estoppel, through this decision rather than pursue a rulemaking under the California Administrative Procedure Act (APA).[3] The adoption will be invalid because it is contrary to the statutory rights of parties and is repugnant to the APA which specifies the process State agencies must follow to adopt regulations and policies which affect the public. The essence of the majority opinion is not a quasi-judicial interpretation of law; it is an invalid form of

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[2]EERA section 3541.5(a)(2) provides, in pertinent part, that:

> The board shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes of this chapter. If the board finds that the settlement or arbitration award is repugnant to the purposes of this chapter, it shall issue a complaint on the basis of a timely filed charge, and hear and decide the case on the merits. Otherwise, it shall dismiss the charge.

[3]The Administrative Procedure Act is codified at Government Code section 11345 et seq.

rulemaking that seeks to adopt a policy that states when PERB will surrender its decision-making responsibilities to an arbitrator's award. Furthermore, it is error to employ the discretionary repugnancy jurisdiction granted to PERB under EERA section 3541.5(a)(2) to establish this change in policy; the issue of an unfair labor practice committed against the employee organization was not part of the arbitrator's award and cannot be the subject of a repugnancy review.

The foundation that underlies this attempted change in policy is defective because it fails to recognize that the National Labor Relations Board (NLRB) decision in 01in Corp. (1984) 268 NLRB 573 [115 LRRM 1056] (Olin) is supported by the NLRB's far greater jurisdictional discretion, which springs from the broad regulatory and quasi-judicial authority conferred on the NLRB through federal law.[4] PERB, by contrast, is a quasi-

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[4]See, e.g., NLRB v. Reliance Fuel Oil Corp. (1963) 371 U.S, 224 [52 LRRM 2046], in which the Supreme Court stated that "Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."

Additionally, 29 U.S.C, section 156(b) of the Labor Management Relations Act gives the Board quasi-legislative power to:

> . . . make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of this Act.

Furthermore, 29 U.S.C, section 164(c)(1) provides that:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of

judicial agency without delegated quasi-legislative powers that go beyond developing regulations necessary and useful to manage its workload efficiently. It cannot adopt rules that impair the statutory rights granted to the parties it regulates. EERA gives employee organizations specific rights and access to PERB that cannot be taken away without express waiver.[5]

Also, the majority fails to acknowledge that the Olin decision is a rulemaking escape from decisions of the federal courts which require a showing that an arbitrator "clearly decided" unfair labor practice issues based on statutes before the NLRB is authorized to defer to the arbitrator's award. NLRB Member Zimmerman's dissent in Olin provides a thorough discussion of federal law on NLRB deferral policy and is a primer on why PERB's policy to recognize arbitrators' awards as a form of collateral estoppel should be developed through a rulemaking process.

Olin stands for the proposition that an arbitrator has adequately considered an unfair labor practice issue if the contractual issue is "factually parallel" to the unfair labor practice issue and the arbitrator was presented "generally with

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> employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction. . . .

[5]The Board has held that in order for a waiver of a statutory right to be found, the party urging waiver must prove it by either clear and unmistakable language in the CBA or demonstrable behavior amounting to a waiver of the right. (See Solano County Community College District (1982) PERB Decision No. 219.)

facts relevant" to resolving the unfair labor practice issue. Stripped of the verbiage, it is apparent a frustrated majority on the NLRB adopted a highly subjective and fuzzy criteria to determine when an unfair labor practice was "clearly decided" by an arbitrator. In the case at bar, it is clear that the arbitrator specifically declined to consider unfair labor practice issues;[6] the independent statutory right of employee organizations to file charges and pursue complaints was not an issue considered by the arbitrator or the ALJ.

Because of the NLRB's greater jurisdictional discretion, unhindered by California's APA, the Olin policy survives although it is viewed as illegal in the Eleventh Circuit (see, e.g., Taylor v. NLRB (1986) 786 F.2d 1516 [122 LRRM 2084]) and appears inconsistent with federal court decisions in other circuits (see, e.g., NLRB v. General Warehouse Corp. (3rd Cir. 1981) 643 F.2d 965 [106 LRRM 2729]; Stephenson v. NLRB (9th Cir. 1977) 550 F.2d 535 [94 LRRM 3224]; Banyard v. NLRB et al. (D.C. Cir. 1974) 505 F.2d 342 [87 LRRM 2001]).

The majority would abdicate PERB's responsibility to consider unfair labor practice charges brought by employee organizations and declines to follow San Diego County Office of

[6]See Arbitrator's Opinion and Award at fn. 30, p. 25, which states that:

> The Arbitrator specifically declines to determine any unfair labor practice issues in this context, as the parties have not agreed to submit them for determination. This Award is limited solely to the contract question presented.

Education (1991) PERB Decision No. 880 (San Diego), which preserved a forum for the prosecution of independent statutory-rights. There exists no statutory support or authority for this position.

The invalidity of the position is shown by former PERB Chairperson Hesse's concurrence in San Diego, which explains PERB's duty and gives some direction as to alternative means of achieving judicial economy. The judicial economy goal of Olin is laudable and PERB should pursue it through a legal rulemaking process that adopts clearer standards of deference to an arbitrator's award while protecting the statutory rights of employee organizations.